IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 105

CHARLES E. WILLIAMS,

Petitioner,

v.

HOWARD JOHNSON'S, INC. OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 58(2) of the Honorable Court, Charles E. Williams, petitioner, hereby makes application for a rehearing of the Petition for Certiorari, which was denied October 11, 1965, and, as grounds therefor, respectfully states as follows:

This case involves a state rule of evidence which always operates to preclude proof of the deprivation of a federal right in cases of non-obvious or indirect state involvement in private discrimination. The rule, one of de-

cision, raises a question upon which the lower courts are in disagreement, *viz.*, whether state statutes or state decisions should govern the trial of a civil case.

The precise question raised by the trial and appeal of the action is whether, in a non-diversity case, state rules may be applied to deny access to relevant evidence within the peculiar knowledge and control of the defendant, *i.e.*, evidence that would tend to establish a claim for recovery under a federal statute. The question is an important one of judicial administration and statutory construction involving the evidence and other procedural requirements of 42 U.S.C. § 1988.

I.

The question arises, primarily, because of the absence of uniform rules of evidence in the district courts. The want of such rules has been a matter of public concern for some time.[1] Accordingly, in response to the demonstrated need, Federal Rules of Evidence are now being drawn for the Court's consideration pursuant to the mandate of the Judicial Conference of the United States. In announcing the appointment of the Committee, the Chief Justice stated that "the task assigned to the Committee is of the greatest importance in improving the administration of justice in the United States courts."

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[1] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts, 30 F.R.D. 73 (1962); Ladd, Uniform Evidence Rules in the Federal Courts, 49 VA. L. REV. 692 (1963); Orfield, Uniform Federal Rules of Evidence, 67 DICK. L. REV. 381 (1963); Degnan, The Law of Federal Evidence Reform, 76 HARV. L. REV. 275 (1962); Sullivan, Evidence Rules in the Federal Courts: A Time for a Change, 38 TEX. L. REV. 452 (1960); Joiner, Uniform Rules of Evidence in the Federal Courts, 20 F.R.D. 429 (1957); Thompson, Rule 43(A) — A Decadent Decade, 34 CORN. L.Q. 238 (1948).

However, until the new rules are promulgated, the rules of evidence now applicable in the district courts will remain "in confusion." The Committee on Rules of Practice and Procedure of the Judicial Conference observed, for example, that the lower courts agree that state statutes should govern the trial of a civil case but differ entirely on the question of whether state decisions should be followed. Preliminary Report (note 1), 30 F.R.D. at 83-84.

But in the instant case, state decisions rather than the relevant state statutes were applied. The defendant, for example, failed to submit testimony on its behalf and rested entirely on the testimony (elicited by plaintiff during discovery) of an "interested" witness who was legally incapable of binding the corporation and who was dead at the time of the trial. A state statute authorizes the court to disregard the defense in such a case. VA. CODE ANN. § 8-290 (1950). And if the "interested" witness were capable of binding the corporation, state law would require corroboration of his testimony. VA. CODE ANN. § 8-286 (1950) (1964 Cum. Supp.).[2]

However, the foregoing statutes were ignored. And state decisions (protecting the defendant's nondisclosure of pertinent information from an unfavorable inference) were allowed to control the case.[3] For all practical purposes, the decisions create conclusive presumptions that good personal reasons always exist for the restaurant

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[2] Note, Corroboration in Virginia under Section 8-286, 39 VA. L. REV. 395 (1953).

[3] *Alpaugh* (Pet., 8) holds that a restaurant keeper is not obliged to disclose the reason for his arbitrary discrimination against prospective customers. And *Randolph* (Pet., 8) establishes nonliability when his discrimination is based solely on race or color. Even though this Court vacated the *Randolph* judgment, the courts below, nevertheless, applied the decisions in the instant case to protect nondisclosure of information that might probably show indirect state involvement in the admitted discrimination.

keeper's arbitrary discrimination against customers irrespective of the particular circumstances. Therefore, proof that his discrimination was induced or sanctioned by the state or its functionaries is always precluded.

These rules of decision, if applied in a non-diversity case brought under 28 U.S.C. § 1343 would short-circuit and frustrate the purpose and effect of the federal discovery rules and the civil rights statutes in every case of non-obvious officially sanctioned private discrimination.

The Court should settle the questions of: (1) whether the relevant state rules of evidence embodied in the statutes or decisions should control a non-diversity case; (2) whether, under any circumstances, state rules may be substituted for the more liberal federal discovery rules in such a case; (3) whether Rule 43(a), FED. R. CIV. P., which is slanted toward admissibility rather than exclusion of evidence, permits examination of a corporate officer at pretrial and trial in order to determine whether the corporation's racial discrimination at only a few of its facilities in a particular area was induced or sanctioned by the state or state agents; and (4) whether the Rules of Decision Act, ordinarily applicable in diversity cases, applies to civil actions invoking the civil rights remedy or whether 42 U.S.C. § 1988 is exclusive in such cases.

Such a ruling would immediately resolve an embarrassing difference of opinion among the lower courts. (The conflicting decisions are discussed in 30 F.R.D. at 83-84.) Such a ruling would be a guide to the Committee drafting the new rules. And it would serve the public interest as an authoritative construction of 42 U.S.C. § 1988 applicable in civil cases.

II.

It is believed that 42 U.S.C. § 1988 authorizes a special rule of practice allocating the burden of proof in suits instituted under 28 U.S.C. § 1343 and alleging private discrimination under color of law. Such a rule of practice is essential if the viability of the rights of action created by 42 U.S.C. §§ 1983; 1985(3) is to be maintained in practice as well as in theory. If there is a federal right to be free from officially sanctioned private discrimination, then there must be a right to the available evidence to establish the claim for violation thereof irrespective of any state rule to the contrary.[4]

The essential element of racial discrimination is a mental process of the alleged discriminator. Hence, the precise reason for the discrimination is always within his peculiar knowledge and control and, thus, requires the alleged discrimination to be proved by circumstantial or indirect evidence, *i.e.*, the inferences to be drawn from negative factors.[5] Compare *Katzenbach v. McClung*, 379 U.S. 295, 304-305, where "the absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food" was not deemed "crucial."

It was the impossibility of proof, rather than absence of substantive remedy, that formed the basis of the general belief that one aggrieved by indirect state sanctioned private discrimination was without a practical remedy in the federal courts. This apparent void in the civil rights acts was felt to justify the lunch counter "sit-ins" and led to the enactment of Title II of the Civil Rights Act of 1964. But the impossibility of proof in such cases, nevertheless,

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[4] The Committee on Rules of Practice and Procedure concluded that "application of state law of evidence" is not required "as long as there are rules of court covering evidence." 30 F.R.D. at 118.

[5] See Hudson, "Peculiar Knowledge" and the Burden of Proof, 1 SOL. Q. 60 (1962).

remains. The decisions validating Title II, for example, did not dispose of the question of burden and sufficiency of proof of racial discrimination since such discrimination was conceded in those cases. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, and *Katzenbach v. McClung*, 379 U.S. 295.

A fair allocation of the burden of proof in any case where the evidence to establish an essential fact is within the exclusive knowledge and control of the adverse party is essential to good judicial administration and abiding public confidence in the judicial process.[6] Such an allocation has been made in other areas.

In tax litigation, for example, the burden of proof has been allocated by statute and court rule for particular purposes. The taxpayer, generally, must establish his claim by a preponderance of evidence. But, in some instances, clear and convincing proof is required. In other instances, the burden is on the Government to prove a host of negative factors. Forman, The Burden of Proof, 39 TAXES 737 (1961).

In the antitrust field, the statute requires the aggrieved purchaser to make out a prima facie case of price discrimination. And, in so doing, the burden of unwieldy proliferation of evidence has been lifted by the Court's per se rule on illegal restraints of trade. The seller is then required to meet the prima facie case by an affirmative showing. 15 U.S.C.A. §§ 13(b), 16(a).

By contrast, a customer aggrieved by the non-obvious officially sanctioned racial discrimination in privately operated public restaurants experiences a sense of helplessness when access to both direct and indirect proof of the fact is denied him solely on the basis of a state evidence rule.

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[6] Note, American Legal Dilemma — Proof of Discrimination, 17 U. CHI. L. REV. 107 (1949); Stumbo, Presumptions — A View at Chaos, 3 WASHBURN L. J. 182 (1964).

III.

The Court should also settle the question of whether the conclusion that the evidence fails to support recovery on the theory of action taken under color of law necessarily precludes recovery where the proof establishes the elements of an actionable wrong under state statutes.

The plain language of 42 U.S.C. § 1988 authorizes an adjudication on state grounds if the civil rights remedy is unsuitable. And it has been held that the statute "adopt[s] state law of the several states as federal law" and thus "enlarge[s] the civil right remedy by authorizing resort to state law." (Pet., 19.)

In the instant case, state law, for example, prohibits a seller of goods or services from doing any advertising in newspapers which tends, either directly or indirectly, to be deceptive or misleading. VA. CODE ANN. § 18.1-131 (1950). And the right of action for injury arising out of violation of the statutory duty is preserved. VA. CODE ANN. § 8-652 (1950). The undisputed evidence (Pet., 10) appears to support recovery on that ground. The complaint demanded judgment for damages under the federal statutes "and such other relief as the Court may deem proper."

This Court has stated that a right of action created by state law is a property right (Pet., 14n), and that federal courts within the state are state courts for certain purposes. *Tennessee v. Davis*, 100 U.S. 257, 271-272. Consequently, once a federal court has jurisdiction, even though federal questions are properly presented by the record, the court is free to decide the case on "local or state questions only." *Siler v. L. & N. R. Co.*, 213 U.S. 175, 191.

IV.

The questions thus presented are not academic or episodic. They are questions of special importance because of the national scope of 42 U.S.C. § 1988; the public interest in better securing the federal rights of due process and equal protection of law; and the public interest in having uniform rules of evidence for the federal courts.

Consequently, the denial of certiorari is likely to be taken as a condonation by the Court of the opinion that the civil rights acts do not apply in cases of non-obvious, indirect, state-sanctioned private discrimination.

"The Virginia Supreme Court of Appeals * * * flatly declared * * * that the law does not compel [the restaurant keeper] to segregate customers according to race." 323 F.2d at 106. This Court rejected that proposition by vacating the *Randolph* judgment and remanding the case for "reconsideration." 374 U.S. 97. But *Randolph*, nevertheless, was given controlling effect in the disposition of the instant action. Therefore, the denial of certiorari is likely to be regarded as an approval by the Court of the *Randolph* rule in civil cases and the rejection of it in criminal prosecutions only. See the orders at 374 U.S. 98, 99, 100, and 378 U.S. 550, 552.

V.

The following affidavit has been filed in support of this petition:

"District of Columbia, to-wit:

"I, Charles E. Williams, the undersigned, depose and state under oath: That I am the petitioner named in the above-styled cause; that the Petition for Rehearing of the Petition for a Writ of Certiorari is presented to the Court in good faith and not for the purpose of delay; and that said

Petition for Rehearing is restricted to substantial grounds available to petitioner although not previously presented.

"/s/ Charles E. Williams

"Subscribed and sworn to before me this First day of November, 1965.

"/s/ Leonard M. Supchak
Notary Public, D. C.

"My Commission Expires February 28, 1969."

CONCLUSION

For the foregoing reasons, the petitioner prays the Court to grant the writ.

Respectfully submitted,

CHARLES E. WILLIAMS
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1329 Shepherd Street, N. W.
Washington, D. C. 20011

November 4, 1965

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